

IDAHO PERSONNEL COMMISSION
P. O. Box 83720
Boise, Idaho 83720-0066
Phone: (208) 429-5502

IDAHO PERSONNEL COMMISSION

STATE OF IDAHO

MAUREEN KARR,)	
)	
)	
Petitioner/Petitioner,)	IPC NO. 01-19
)	
vs.)	DECISION AND ORDER ON
)	PETITION FOR REVIEW
DIVISION OF VETERANS)	
SERVICES, STATE OF IDAHO)	
)	
Respondent.)	
_____)	

On petition for review from the April 5, 2002, decision of Hearing Officer David E. Wynkoop (hereinafter "Hearing Officer"). Petitioner Maureen Karr (hereinafter "Petitioner" or "Karr") appeared through her counsel of record, John C. Lynn. Respondent Division of Veterans Services, State of Idaho (hereinafter "DVS") appeared through counsel of record Maurice O. Ellsworth, Special Deputy Attorney General. J. Michael Kulchak argued.

Karr petitions for review from the Hearing Officer's decision upholding her dismissal from classified service. Following a two-day evidentiary proceeding, the Hearing Officer determined that DVS established, by a preponderance of the evidence, that Karr's conduct in question violated the provisions of Idaho Code § 67-5309(n) and Idaho Personnel Commission Rule 190.01.e. Accordingly, the Hearing Officer ruled

DVS had proper cause to terminate Karr's employment and upheld Karr's dismissal from classified service. We REMAND.

I.

BACKGROUND

This is a disciplinary dismissal case under Idaho Personnel Rule 190. DVS dismissed Karr from classified employment as a RN manager at the Idaho State Veterans' Home in Boise (hereinafter "Home") pursuant to Idaho Code § 67-5309(n)(5) & IDAPA 15.04.01.190.01.e. Specifically, this case arises out of two incidents, the first occurring on September 5, 2001 and the second occurring on September 7, 2001.

The record and briefs of the parties reflect that the two incidents involved conversations between Karr and Celina Sturgis (hereinafter "Sturgis"), the Acting Director of Nurses at the Home, and Karr's supervisor, at the time of the incidents. The September 5, 2001 incident involved a conversation between Karr and Sturgis regarding a request for transfer by Stephanie Mason (hereinafter "Mason"), an LPN supervised by Karr. Sturgis and DVS assert Karr walked away from the conversation prior to its conclusion and while leaving stated to Sturgis "Why should I believe you, everyone lies here". Karr denies refusing to discuss anything with Sturgis and denies walking away from the conversation.

The September 7, 2001 incident involved a conversation between Karr and Sturgis regarding a follow-up investigation of a patient incident report on Floor One, the floor Karr was responsible for supervising. DVS asserts Sturgis entered Karr's office on the morning of September 7, 2001 and requested Karr investigate the patient incident report. DVS further asserts that Karr gestured for Sturgis to come nearer as she was

leaving the office and said “how much do they pay you to be such a bitch” and “you are going to lose bitch”. Karr’s version is drastically different. Karr asserts Sturgis entered her office and rudely slammed the patient incident report on her desk and angrily said that Jeff Piper (Acting Administrator) had said “he didn’t like the way the incident was done and you need to investigate it”. Karr denies the incident happened as DVS alleges and particularly denies calling Sturgis a “bitch”.

DVS issued a Notice of Contemplated Action to Karr on September 10, 2001. Karr, through counsel provided a response on September 12, 2001. On September 21, 2001, DVS terminated Karr’s employment pursuant to I.C. § 67-5309(n)(5) & IPC Rule 190.01.e, and Karr timely appealed to the Commission. The Hearing Officer upheld her dismissal, and the matter is now before the full Commission on petition for review.

II.

STANDARD OF REVIEW

The standard of review on disciplinary appeals to the Commission is as follows:

When a matter is appealed to the Idaho Personnel Commission it is initially assigned to a Hearing Officer. I.C. § 67-5316(3). The Hearing Officer conducts a full evidentiary hearing and may allow motion and discovery practice before entering a decision containing findings of fact and conclusions of law. In cases involving Rule 190 discipline, the state must prove its case by a preponderance of the evidence. IDAPA 29.01.01.201.06. That is, the burden of proof is one the state to show that at least one of the proper cause reasons for dismissal, as listed in I.C. § 67-5309(n) and IDAPA 28.01.01.190.01, exist by a preponderance of the evidence.

On a petition for review to the Idaho Personnel Commission, the Commission reviews the record, transcript, and briefs submitted by the parties. Findings of fact must be supported by substantial, competent evidence. *Hansen v. Idaho Dep’t of Correction*, IPC No. 94-42 (December 15, 1995). We exercise free review over issues of law. The Commission may affirm, reverse or modify the decision of the Hearing Officer, may

remand the matter, or may dismiss it for lack of jurisdiction. I.C. § 67-5317(1).

Soong v. Idaho Department of Welfare, IPC No. 94-03 (February 21, 1996), *aff'd.*, 132 Idaho 166, 968 P.2d 261 (Ct. App. 1998).

III.

ANALYSIS

We are presented with two issues: (1) whether the Hearing Officer properly limited the scope of the hearing by considering only evidence occurring after August 20, 2001; and (2) whether DVS met the burden for establishing proper cause, under Rule 190, for disciplinary action. We address the first question below. Because our answer requires further proceedings before the Hearing Officer we are unable to answer the second question. Instead, we remand the case to Hearing Officer Wynkoop for further proceedings consistent with the analysis set forth below.

A. Evidence Admitted at the Hearing

Prior to the hearing on this matter, at the request of the parties, the Hearing Officer addressed and ruled on issues defining the scope of the hearing and generally what evidence was admissible at the hearing. There had been prior DVS proceedings involving Karr concerning letters that were evidently written by Karr to the Governor asserting wrongdoing at the Idaho State Veterans' Home in Boise (hereinafter "Home"). Karr asserts that a conspiracy to retaliate against her was perpetrated by the then Home Administrator and Celina Sturgis (hereinafter "Sturgis") in a conspiracy to "get rid" of her.

In her Prehearing Memorandum Karr stated:

Petitioner declines to pursue a claim that she has suffered retaliation for expressing 'protected speech' in these proceedings. Petitioner specifically requests that the Hearing Officer refrain from making any findings with regard to any First Amendment retaliation analysis as it is not necessary for purposes of these proceedings. A clarification of the scope of this appeal is thus in order, and Petitioner therefore requests a prehearing conference to define the parameters of these proceedings.

Petitioner's Prehearing Memorandum, p 3.

DVS concurred and further contended that the only evidence relevant to this proceeding is whether Karr said what she is alleged to have said on September 5, 2001 and September 7, 2001. During the hearing, however, both parties attempted to introduce evidence to provide a context to support their credibility and to attack the credibility of the other and their witnesses.

The Hearing Officer limited the testimony and other evidence to those events which occurred after Karr returned to work on August 20, 2001 from a prior suspension and investigation. From testimony at the hearing and from a problem solving request admitted into evidence as Exhibit 11, the resulting disciplinary action taken by DVS after investigation was a written reprimand.

B. Relevant Statutory and Administrative Provisions

Evidentiary matters at an administrative hearing are governed by Idaho Code § 67-5251 and IDAPA 04.11.01.600. The statute provides in relevant part:

(1) The presiding officer may exclude evidence that is irrelevant, unduly repetitious, or excludable on constitutional or statutory grounds or on the basis of any evidentiary privilege provided by statute or recognized in the courts of this state. All other evidence may be admitted if it is of a type commonly relied upon by prudent persons in the conduct of their affairs.

Idaho Code § 67-5251. Similar language appears in IDAPA 04.11.01.600:

Evidence should be taken by the agency to assist the parties' development of the record, not excluded to frustrate that development. The presiding officer at hearing is not bound by the Idaho Rules of Evidence. No informality in any proceeding or in the manner of taking testimony invalidates any order. The presiding officer, with or without objection, may exclude evidence that is irrelevant, unduly repetitious, inadmissible on constitutional or statutory grounds, or on the basis of any evidentiary privilege provided by statute or recognized in the courts of Idaho. All other evidence may be admitted if it is of a type commonly relied upon by prudent persons in the conduct of their affairs. The agency's experience, technical competence and specialized knowledge may be used in evaluation of evidence.

C. Excluded Evidence

As noted earlier, at the hearing the Hearing Officer initially addressed and ruled on issues defining the scope of the hearing and evidence to be admitted. At that time, and at various points during the hearing, Karr's counsel advanced arguments and attempted to present evidence to show that DVS terminated Karr in retaliation for voicing concerns about the management at the Home in a June 8, 2001 letter to the Governor. Generally, Karr in her offers of proof offered evidence in order to show that upper management at the Home knew of Karr's June 8, 2001 letter to the Governor and the complaints and concerns therein; Karr was suspended on June 25, 2001 while an investigation of the same took place; and Karr was eventually reprimanded with respect to the June 8, 2001 letter to the Governor for breaching confidential personnel issues with other employee and failing to follow a suitable process in communicating concerns about problems at the Home.

Karr further, as an offer of proof, sought to introduce evidence that Administrator Bermeosolo wanted to fire Karr over her disclosures but was voted down. Karr also

sought to present evidence that the investigation that resulted with respect to the June 8, 2001 letter to the Governor stemmed from a "List of Concerns" compiled by Sturgis and given to Susan Lowman-Thomas (along with the June 8, 2001 letter to the Governor) and which was forwarded to the Division of Human Resources and ultimately investigated by Lynn Steele. Karr sought to provide testimonial evidence to explain and refute the investigation findings and in so doing, show Sturgis to have falsely accused her. Finally, Karr sought to delve into the issue of prior counseling and documentation of the same in her personnel file at the Home. Karr sought to show through testimony that counseling memos appeared in Karr's personnel file after her suspension on June 25, 2001 and before her return on August 20, 2001. Through such testimony, Karr sought to show that DVS created a counseling history after her suspension on June 25, 2001 and prior to her return on August 20, 2001.

In sum, Karr, through her offers of proof would have attempted to show as of August 20, 2001: (1) that upper management at the Home knew of Karr's June 8, 2001 letter to the Governor and the complaints and concerns therein; (2) Sturgis falsely accused her of various wrongdoing following the June 8, 2001 letter to the Governor; (3) Karr was suspended on June 25, 2001 while an investigation of the same took place; (4) Karr was eventually reprimanded as a result of the investigation; (5) Counseling documents were placed in Karr's personnel file to show prior counseling; and that (6) Gary Bermeosolo wanted to terminate Karr over the June 8, 2001 letter, but was out-voted. Included in Karr's offers of proof are Exhibits 1-11, 13 and 19 which track events prior to August 20, 2001 and attempt to support the same. After review of the transcript, it is noted that Exhibits 7 and 11 were actually admitted into evidence, so only Exhibits

1-6, 8-10, 13 & 19 were not admitted at the hearing and were offered in support of the offers of proof.

As noted above, the Hearing Officer considered Karr's arguments and limited the scope of the hearing to events after her return to work on August 20, 2001. Specifically, the Hearing Officer found that the proceedings prior to August 20, 2001 were addressed in a prior disciplinary action¹ and had limited or no probative value or relevance to this action. Karr complains that the Hearing Officer's ruling narrowed the window from which the September incidents were viewed and didn't give the fact finder a broader picture of the factual circumstances that formed the backdrop for the events that transpired for purposes of determining the credibility of the witnesses. The Commission agrees.

The Hearing Officer appears to emphasize the fact that Karr suggested the limited scope of review in her prehearing memorandum. As noted above, in that prehearing memorandum, Karr requested the Hearing Officer "refrain from making any findings with regard to any First Amendment retaliation analysis as it is not necessary for purposes of these proceedings." And during preliminary discussion of the scope at the beginning of the hearing, Karr's counsel reiterated the position that "I don't want this hearing officer to make a first amendment analysis. I don't think it's needed. It's not necessary. I think it's beyond the scope of the Personnel Commission proceedings, you know." Hearing Transcript, pp. 11-12.

¹ The Commission assumes the Hearing Officer, when he refers to a "prior disciplinary action", means the suspension with pay for investigation. If the Commission assumes correctly, the Hearing Officer is mistaken. A suspension for investigation with pay is effectuated pursuant to IPC Rule 190.02 and is not a "disciplinary action". The disciplinary action taken stemmed from the investigation and consisted of a written reprimand. Exhibits 11-12.

The Commission agrees that a First Amendment analysis is beyond the scope of IPC proceedings and is not necessary for purposes of determining the credibility of the witnesses at the hearing on Karr's termination. The IPC only entertains the question whether DVS established proper cause for Karr's termination by a preponderance of substantial competent evidence under Idaho law and IPC rules. However, towards this end, it is appropriate that the Hearing Officer entertain evidence of alleged retaliation and evidence that puts the allegations of insubordination, forming the basis for termination, into proper context for the purpose of determining the credibility of witnesses.

Such evidence is relevant in a determination whether DVS has proven its case for Karr's termination by a preponderance of the evidence. While the Idaho Rules of Evidence do not fully apply during a termination hearing, the IPC looks there for the definition of "relevant evidence". "Relevant evidence" is evidence "having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." I.R.E. 401.

Evidence tending to shed light on alleged manufacturing of counseling documents being placed in Karr's personnel file to show prior counseling and evidence that Gary Bermeosolo wanted to terminate Karr over the June 8, 2001 letter is certainly relevant in this regard. It is evidence that provides the background leading up to the incidents of September 5 & 7, 2001, and if found credible, is evidence that DVS was itching to "get rid" of Karr. This sort of evidence, again if credible, requires the Hearing

Officer to more closely examine the incidents of September 5 & 7, 2001, with respect to credibility of the various witnesses.

Likewise, evidence of the June 8, 2001 letter to the Governor and its contents, and evidence as to what transpired thereafter at the Home, including evidence of Karr's suspension with pay and the subsequent investigation pursuant to IPC Rule 190.02 is relevant in this termination proceeding because it sheds a broader light on the credibility of key witnesses involved and it provides a fuller picture from which to gauge whether DVS proved its case by a preponderance of the evidence; whether DVS met its burden.

D. Remand

For the foregoing reasons, we remand the case to Hearing Officer Wynkoop who shall make further findings of fact as necessary and make any necessary conclusions of law stemming from his consideration of further evidence and testimony as follows:

(1) Evidence to be allowed and considered shall only include evidence as provided below, within the timeframe of the June 8, 2001 letter to the Governor (including evidence of the letter to the Governor) up until Karr's return to DVS on August 20, 2001;

(a) Evidence that upper management at the Home knew of Karr's June 8, 2001 letter to the Governor, the complaints and concerns therein, and how they became aware of the letter;

(b) Evidence that Sturgis (allegedly) falsely accused Karr of various wrongdoing following the June 8, 2001 letter to the Governor;

(c) Evidence that Karr was suspended with pay on June 25, 2001 while an investigation with respect to the letter to the Governor occurred;

(d) Evidence that counseling documents were placed in Karr's personnel file to show prior counseling;

(e) Gary Bermeosolo wanted to terminate Karr over the June 8, 2001 letter, but was out-voted;

(f) Evidence that Karr was reprimanded stemming from the investigation.

2. The Hearing Officer shall admit and consider Exhibits 1, 2, 3, 4, 5, 6, 8, 9, 10, 13 & 19 in connection with the above.

3. The Hearing Officer shall not allow any new discovery proceedings but may allow additional witnesses to testify as relevant to outlined evidence above.

IT IS SO ORDERED.

